

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re WYATT N., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAY N.,

Defendant and Appellant.

D054091

(Super. Ct. No. EJ2904)

APPEAL from an order of the Superior Court of San Diego County, Gary M.

Bubis, Judge. Affirmed.

Jay N. appeals an order summarily denying his petition for modification under Welfare and Institutions Code section 388.¹ We affirm the order.

¹ Further statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

Wyatt N. was born in April 2007 to Jay N. and R.W. (together, parents). Wyatt came to the attention of the San Diego County Health and Human Services Agency (Agency) in mid-June, when Jay and R.W. brought Wyatt to a San Diego area hospital and asked hospital personnel to care for their baby until their July Social Security check arrived. The parents said that they did not have any supplies, or any money to buy supplies, for the baby.

The Agency offered a voluntary services plan to the parents. Jay, who had been diagnosed with paranoid schizophrenia, agreed to continue to consult with his psychiatrist for monitoring of his medications. Both parents agreed to participate in family preservation services and to submit to random drug testing. Approximately two weeks later, the social worker learned that the family had moved to Mexico.

In August 2007, Jay telephoned the social worker. He informed the social worker that he and R.W. were no longer together and that he had returned with Wyatt to the San Diego area. Jay stated that he was not able to care for the baby by himself.

During the Agency's emergency investigation, the social worker learned that the parents had regularly bought and used methamphetamine for the past 18 months and that Jay had been without his prescribed medications for the past two months. The Agency detained Wyatt, who appeared to be a healthy and responsive four-month-old baby, and filed a petition under section 300, subdivision (b).

The parents submitted to jurisdiction. The court removed Wyatt from parental custody and placed him in foster care. R.W. waived visitation and reunification services.

The court ordered a plan of family reunification services for Jay that included weekly supervised visitation with Wyatt, individual counseling, parenting education services, and participation in the Substance Abuse Recovery Management System program. The court authorized a psychological evaluation, if requested by Jay's therapist, and ordered Jay to remain compliant with his medication regime.

Jay began individual therapy in September 2007. The therapist reported that Jay was very motivated to reunify with Wyatt and that Jay's mental health condition appeared to be stabilized. The therapist opined that Jay was very low functioning and that he had problems meeting his own needs. Jay completed a detoxification program in October, but did not attend a recommended follow-up substance abuse treatment program. In late November, Jay was admitted to an alternative treatment program. He had an unsatisfactory drug test in January 2008, did well in the treatment program in February, and then relapsed three times in March, testing positive for marijuana use. Jay attended one session of a parenting education class.

Jay visited Wyatt every week. They had an affectionate relationship. Jay was able to perform basic parenting tasks, but he appeared to lack knowledge about age appropriate child development. In March 2008, the social worker increased visitation to two hours per week. Jay was attentive to Wyatt during visits and accepted parenting tips from the visitation monitor.

At the six-month status review hearing in April 2008, the court found that Jay had not participated regularly, and did not make substantive progress, in the court-ordered

treatment plan. The court terminated reunification services and set a hearing under section 366.26 (previous order).

The section 366.26 hearing was held on November 12, 2008. On that day, Jay filed a petition under section 388 (modification petition). Jay requested that the court vacate its previous order setting the section 366.26 hearing and return Wyatt to his care. In his modification petition, Jay alleged that his circumstances had changed in that he had been clean and sober since March 2008 and had completed a parenting class. He asserted that it was in Wyatt's best interests to be with his biological father. Jay submitted a certificate showing that he had completed a 12-session parenting education program.

The court stated that it had reviewed the entire file and read and considered the modification petition. The court determined that Jay had not made a prima facie showing that there were changed circumstances and that the proposed modification may be in Wyatt's best interests. The court acknowledged that Jay's completion of a parenting education class showed that his circumstances were changing; however, the assertions that Jay had remained sober and that he was ready to care for Wyatt were merely conclusory. Further, Jay made no showing that returning Wyatt to his care may be in the child's best interests. The court denied Jay's request for an evidentiary hearing.

The court then proceeded to the contested section 366.26 hearing. The court noted that Jay clearly loved his son but that reunification efforts had not been successful. The court terminated parental rights.

DISCUSSION

A

The Parties' Contentions

Jay contends that the court erred when it denied his request for a hearing on the merits of his petition. Relying on *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, Jay asserts that the denial of an evidentiary hearing on his modification petition increased the risk of erroneous findings under section 366.26, failed to comport with the precise requirements of due process, and undermined the constitutionality of the dependency process as a whole, and thus requires reversal of the orders terminating parental rights.

The Agency asserts that the court correctly determined that the modification petition did not state a prima facie case sufficient to justify an evidentiary hearing.

B

Legal Framework and Standard of Review

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, and that the proposed modification may be in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

The court must liberally construe the petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*); Cal. Rules of Court, rule 5.570(a).)²

² Further rule references are to the California Rules of Court.

"The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Marilyn H.*, at p. 310; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.) However, "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189; see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

We review a summary denial of a hearing on a modification petition for an abuse of discretion. (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.)

C

The Court Did Not Abuse Its Discretion in Summarily Denying the Modification Petition

Jay asserts that the modification petition stated a prima facie case of changed circumstances in that he had completed a parenting course and had remained sober for more than six months. He contends that the record shows that reinstating reunification services may be in Wyatt's best interests because reunification services had been

terminated on the specific grounds that Jay did not comply with case plan requirements for parenting education and drug treatment.³

The court correctly determined that the modification petition did not state a prima facie case. (See *Marilyn H.*, *supra*, 5 Cal.4th at p. 310; *In re Hashem H.*, *supra*, 45 Cal.App.4th at pp. 1798-1799; *In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.) Significantly, Jay's modification petition did not contain facts showing that Jay could attend to Wyatt's needs without support or intervention during visitation, or that a mental health professional or social worker had concluded that Jay was now able to safely and appropriately parent Wyatt, or that Jay had continued to participate in a substance abuse treatment or a 12-step program.

In order to sustain a prima facie finding, the facts alleged in a petition under section 388, if supported by the evidence, must be sufficient to sustain a favorable decision on the petition. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.) Here, the court reasonably determined that the facts alleged in the petition, if proved, would not be sufficient to allow the court to safely return Wyatt to Jay's care, or to determine that delaying the selection of a permanent plan for Wyatt, who was then 19 months old and had been in foster care for 15 months, may be in the child's best interests. (See *In re*

³ Jay's argument misstates the nature of the relief requested in the modification petition. The petition did not request an additional period of reunification services. Rather, it specifically sought the "return the minor to the father." Contrary to Jay's assertion that "the petition simply claimed that the minor's interests would be served by providing the minor with a chance to reunify with his biological father," the petition stated only that "the child deserves to be with his biological father."

Baby Boy L. (1994) 24 Cal.App.4th 596, 609-610 [after reunification services are terminated, the focus of the court's concern shifts from assisting the parent in reunification to securing a stable new home for the child]; *Kimberly H. v. Superior Court* (2000) 83 Cal.App.4th 67, 71-72.)

The court also could properly have denied an evidentiary hearing on the merits of the modification petition, on the ground that the modification petition was untimely filed. The modification petition was not filed until the day of the section 366.26 hearing. Generally, requests for modification made on the day of the section 366.26 hearing are disfavored. (See *Marilyn H.*, *supra*, 5 Cal.4th at p. 310, *In re Baby Boy L.*, *supra*, 24 Cal.App.4th at p. 609; see also §§ 386, 388, subd. (d) [the court cannot modify a previous order without giving the parties prior notice of the request], § 290.2, subd. (c)(1) [notice must be given at least five days before the hearing, unless the hearing is set to be heard in less than five days, in which case notice shall be given at least 24 hours prior to the hearing]; see also rule 5.524(e).)

Under these circumstances, Jay cannot meet his burden on appeal to show that the court abused its discretion. (Cf. *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We conclude that the court reasonably exercised its discretion when it denied Jay's request for an evidentiary hearing on the merits of his modification petition. (§ 388; subds. (a), (d); rule 5.570(d).)

DISPOSITION

The order is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.